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Supreme Court of the United States

OCTOBER TERM, 1957

No. ..689

BOLINDERS COMPANY, INC.,

Petitioner,

against

THE UNITED STATES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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PETITION

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioner prays that a writ of certiorari issue to review a judgment of the United States Court of Claims, granting summary judgment of dismissal on the merits of petitioner's complaint. Petitioner sued for a judgment (a) reforming an amendment to a contract between the parties to conform such amendment to a decision and directive (under Section 201 of the First War Powers Act of 1941 as amended) of the Army Contract Adjustment Board dated August 10, 1951 and awarding the difference between the amendment as so conformed and the amendment as actually executed amounting to $28,796.40, and (b) for the further sum of $25,803.63 by way of additional relief which had been applied for under the War Powers Act and denied by defendant's Contracting Officer.

The Opinion of the Court of Claims

is reported in 153 F. Sup. 381 and is printed at pages 21-26 *infra*.

The Grounds of Jurisdiction.

The judgment sought to be reviewed (301)* is dated and was entered on July 12, 1957 (297).

On August 5, 1957—well within the 30 day period provided for by Rule 53(c) of the Rules of the Court of Claims—petitioner filed a motion for a rehearing (303). That motion was denied by an order dated and entered October 9, 1957 (321).

This petition is filed pursuant to 28 U. S. C. 2101(c).

The Questions Presented

1. Does Section 201 of the First War Powers Act (as amended) authorize and provide solely for executive grace or largess, to be granted or withheld in the *absolute* discretion of the President's delegates, or does it create justiciable rights in those citizens who under the terms of the Act may become beneficiaries thereunder?

2. Since, under executive Regulations, the delegates and sub-delegates of the President's power under the Act are required to consider and dispose of applications for relief in accordance with "sound judgment . . . on the basis of all of the facts" of each case, does that not render denials of relief judicially reviewable even if under the Act without the Regulations the President or his delegates lawfully could, if they saw fit, act in absolute—that is, arbitrary—discretion?

3. Where an amendment to a contract has been authorized and directed by the highest authority under the Regulations—the Army Contract Adjustment Board—are

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* Numerical references are to the page numbers of the Transcript of Record as certified by the Clerk of the Court of Claims.

the interpretation and implementation of the directive a matter of absolute discretion, or is it a decision or award which the contractor has a legal right to have observed and to enforce?

4. In the processing of applications under the Act in accordance with the Regulations promulgated thereunder, is a contractor entitled to the observance of the essentials of due process—at least to the extent that the ultimate authority, the Army Contract Adjustment Board, render no adverse decision until after due hearing?

The Statutes Involved

This case involves the following statutes:

Section 201 of the First War Powers Act (55 Stat. 839) as amended (64 Stat. 1257)—quoted below.

Executive Order #10210, February 2, 1951, 16 F. R. 1049, 3 C. F. R. (1951 Sup.)—set forth at pages 27-8 of Appendix hereto.

Regulations Governing the Exercise of Certain Contractual Authority in Connection with Emergency Powers, 16 F. R. 2623, 7650-7654, 32 C. F. R. Secs. 431.1-438.4, 590.900-590.9062 (1951 Revised Ed.)—set forth in the Appendix at pages 28-36.

Administrative Procedure Act, 60 Stat. 237, 5 U. S. C. Chap. 19, Sec. 1001-1009—quoted below.

Judicial and Judiciary Procedure, 28 U. S. C. Sec. 1491—quoted below.

The First War Powers Act (55 Stat. 839, as amended 64 Stat. 1257):

"Sec. 201. The President may authorize any department or agency of the Government exercising functions in connection with the national defense, in

accordance with regulations prescribed by the President for the protection of the interests of the Government, to enter into contracts and into amendments or modifications of contracts heretofore or hereafter made and to make advance, progress and other payments thereon, without regard to the provisions of law relating to the making, performance, amendment, or modification of contracts whenever he deems such action would facilitate the national defense."

The Executive Order and Regulations

The text, as far as material, of the above referred to Executive Order and Regulations is set forth in the appendix (pp. 27-36, *infra*).

That Executive Order, it may be helpful to summarize here, authorized the full use of the powers under the above quoted Section 201 "under such regulations, which shall be uniform to the extent practicable, as may be prescribed or approved by the Secretary of Defense" and authorized the secretaries of defense, the army, the navy, the airforce to "exercise the authority herein conferred" and authorized them respectively to delegate and their delegate to sub-delegate such authority. That Executive Order further authorized modification of contracts with or without consideration "irrespective of the time or circumstances of the making, or the form, of the contract amended or modified . . . and irrespective of the rights which may have accrued."

The Regulations contained the delegations authorized by the Executive Order, prescribed the procedures to be followed, which included a requirement of "written findings" and repeated admonitions that "the determination of whether in a particular case a contract amendment is to be entered into without consideration . . . to facilitate the national defense is a matter of sound judgment to be made on the basis of all the facts of such case" and that

the setting forth in the Regulations of examples "is not intended to exclude other cases where the circumstances are such as to warrant the granting of relief."

Administrative Procedure Act, 60 Stat. 237, 5 U. S. C., Chapter 19, §§ 1001, *et seq.* (1952 Ed.)—as far as material:

§ 1001. DEFINITIONS.

As used in this chapter—

(a) AGENCY.

"Agency" means each authority (whether or not within or subject to review by another agency) of the Government of the United States other than Congress, the courts, or the governments of the possessions, Territories, or the District of Columbia. . . .

. . . . . .

§ 1009. JUDICIAL REVIEW OF AGENCY ACTION.

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) RIGHT OF REVIEW.

Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

. . . .

(c) ACTS REVIEWABLE.

Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly re-

viewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

. . . .

(e) SCOPE OF REVIEW.

So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error. . . .

Judicial and Judiciary Procedure, 28 U. S. C. 1491:

§ 1491. CLAIMS AGAINST UNITED STATES GENERALLY

The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States:

. . . .

(2) Founded upon any action of Congress; or

(3) Founded upon any regulation of an executive department; . . .

. . . .

Statement of the Case

The Facts

On or about June 29, 1950, or as of that date, petitioner entered into a contract with the United States, through the latter's Signal Corps Procurement Agency, to manufacture and supply 214 Diesel engine power units at a unit price of $3,947 "delivered FOB destination", half to be delivered at Baltimore and the others at Sacramento, California (complaint* paragraph 3 (1-2), admitted in the answer (53)). The inclusion of additional minor items brought the contract price to a total of $848,733 (id). By an amendment agreed upon on or about January 31, 1951 and formalized by a "change order" dated March 13, 1951, the number of units was increased to 228 and the total price was increased correspondingly (complaint paragraph 4 (2), *admitted* in the answer (53)).

The contract price was in accordance with a bid made by the petitioner which was based upon the then prevailing

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* The complaint was denominated a petition. To differentiate it from this petition, it is referred to herein as the complaint rather than petition.

costs of material and labor. Subsequently, the conflict in Korea caused a considerable increase in those prices. That rendered it impossible for the petitioner to perform the contract except at a substantial loss which its financial condition did not permit. The Army Audit Agency found and reported that, on the basis of February 20, 1951, prices, each unit had to cost petitioner (without allowance of any profit) $4,689.31 *FOB its own plant in Newark,* New Jersey (Govt's Ex. 16, pp. 6, 7 and last page thereof). Petitioner applied for a modification of the contract by increasing the price. After approval of the application by the Contracting Officer and by the Chief of Procurement to the extent of increasing the price to petitioner's actual cost as found and reported by the Army Audit Agency (123-9; Govt.'s Exs. 2, 3), the matter reached the Army Contract Adjustment Board, as required by the Regulations.

That Board, in a decision dated August 10, 1951 (12-17): noted that the report of the Army Audit Agency which was before it "computed" the "unit price" at "$4,689.31 per unit"; quoted from the report of the Chief of Procurement "that the contractor will be unable to continue delivery of the power units (which he considers a critical item) 'unless the contract price *is adjusted to reimburse it for the increase in costs* which have occurred since the inception of the contract' . . ." (emphasis supplied); after "considering the evidence in support of [petitioner's] application", found, among other things, that the cost increase was "due to conditions over which [petitioner] had no control", that "any attempt to absorb" the difference by the petitioner or its affiliate "would result in the certain bankruptcy of both", that a failure by the petitioner to perform its contract would require filling thereof by others at a cost higher to the government "than those computed by the auditor and in addition [would entail] a considerable loss of time", and that, therefore, "increasing the contract price . . . 'will facilitate the National defense' " (12-16).

Accordingly, the Board determined that (16): "a. The request . . . for an increase . . . is approved to the extent that the contract consideration will be increased in the amount of $169,246.68 only. b. To enable the contractor to obtain such increase, the contracting officer is authorized to execute a supplement to the contract *increasing* the unit price thereof from *$3,947 to $4,689.31* per unit, applicable to the entire contract quantity; namely, 228 units" [although "as of 25 July 1951 a total of 60 units had been produced and delivered"] . . . (16, emphasis supplied.)

It will be noted that $3,947 is the original contract unit price "delivered F. O. B. destination" as reported by the Army Audit Agency (Govt.'s Ex. 16 at p. 2 thereof), $4,689.31 per unit is the precise figure reported by the Army Audit Agency as the "current" (as of February 20, 1951) unit "total cost, F. O. B. plant" (*so noted at least three times in its report)*, that the difference between $3,947 and $4,689.31 is $742.31, that 228 times that difference is $169,246.68.

That complete conformity to the figures of the Army Audit Agency report and, to boot, the repeated statements in the decision that it was necessary that the *contractor be paid its full actual cost,* render impossible, it seems clear, the reasonable reading of the Board's determination and directive other than as an award of an increase of the price *to $4,689.31* for the unit, *as calculated by Army Audit Agency* "F. O. B. plant".

Between the date of the original contract and February 20, 1951 (the date as of which the Army Audit Agency made its calculations and findings), several changes in the specifications had been agreed upon between petitioner and the Signal Corps *which remained to be formalized* by "change orders". Those changes were (a) of a physical nature which reduced the cost by $27.70, and (b) from "delivered F. O. B. destination" to "F. O. B. plant", sav-

ing the contractor $98.60. *The Army Audit Agency had been informed of those changes* and its April 9, 1951 report as at February 20, 1951 (Govt.'s Ex. 16) *computed the cost of the unit as thus changed.* For that reason the Audit Agency reported on the basis of unit cost "F. O. B. plant". Thus, on the face of the report, it appeared that the change in place of delivery had been taken into account. That the physical changes also were taken into account is conclusively confirmed by the Army Audit Agency, the Contracting Officer, the Executive Officer and also the Chief of the Legal Division of the Corps of Engineers (Govt.'s Exs. 4, 5—129-134; Plaintiff's Exs. K, L—180-184).

After February 20, 1951 and before the implementation of the Army Contract Adjustment Board's decision or award, those changes were formalized by modifications (Id.). In addition, other changes were agreed upon which likewise were formalized: those consisted of (a) a physical change increasing the cost by $17.50 per unit and (b) a requirement that the units be transported and placed upon railroad cars in Newark at a cost of $21.50 (Id.). The transporting and loading requirement, however, was never reduced to writing in explicit terms (id.; also complaint, par. 6 at pp. 2-3—admitted in Answer—53).

In consequence, at the time the Contracting Officer came to implement the August 10, 1951 decision and award of the Army Contract Adjustment Board, the contract unit price no longer was $3,947 nor "delivered F. O. B. destination". The contract then called for a somewhat changed unit at a unit price of $3,859.70 "F. O. B. factory, Newark, New Jersey", with the understanding, however, that the plaintiff was to truck the units to and load and block them on the railroad cars (Complaint, pars. 5, 6, 7 at pp. 2-3, *admitted* in the Answer—53).

These intervening amendments confused the Contracting Officer in his implementation of the decision and award of the Army Contract Adjustment Board. Quite obviously,

that award was upon the record before the Board and thus was on the basis of, and was related to, the facts contained in that record. So viewed, as in reason it must be, the unit price of $4,689.31 specified therein was for a unit as agreed to prior to February 20, 1951 and F. O. B. plant. There having been, later, as already noted, additional changes increasing the cost by $21.50 "loading expenses" and $17.50 for a physical change, the contractor, to get the awarded price of $4,689.31 as of February 20, 1951 had to receive, and was entitled to, the added cost of those two later changes in specifications amounting to $39, or a total unit price of $4,728.31 (Govt.'s Exs. 4, 5 at pp. 129-134; Plf.'s Exs. K, L at pp. 182-184).

But the Contracting Officer increased the price to neither the $4,689.31 specified in the award (without the additional post-audit changes amounting to $39) *nor* $4,728.31 but to the smaller figure of only $4,602.01.

He did that by adding $742.31 not to the unit price of $3,947 mentioned in the award to make up the $4,689.31 provided for in the award, but to $3,859.70, which was not in any way mentioned in the award, to make up a new unit price of $4,602.01 inclusive of the post-audit $39 specification increases, as compared to the $4,689.31 of the award without those increases.

That was a short-changing of the contractor by $126.30 per unit.

When petitioner applied for a correction, *the Signal Corps authorities*—the Contracting Officer, the Chief of the Legal Division, the Executive Officer (Govt.'s Exs. 4 and 5 at pp. 129-134; Plf.'s Exs. K and L at pp. 182-184)—*recognized and acknowledged the short-changing.* However, they felt it necessary to get the Army Contract Adjustment Board's approval to a rectifying amendent. On application therefor, the President of the Board—not the Board—failed to comprehend the precise nature of the

application, and, without notice to or knowledge of petitioner and without consulting the Board, returned the application "in order that the data normally required in support of an application for a contract price increase without consideration may be obtained and the matter resubmitted to the Board in accordance with its entitled subject; namely, as an 'Application for Supplemental Relief' " (Govt.'s Ex. 6 at pp. 134-6).

Petitioner was not notified of that disposition (167-169). However, when petitioner decided to apply for a further increase by reason of cost increases which occurred after the Army Audit Agency's Report of April 9, 1951, the Signal Corps authorities suggested that there be included in that application the request for the correction of the error set forth above (172-173). Petitioner did so (Plf.'s Ex. L at pp. 182-4). However, this time, the Contracting Officer held that the continuation of petitioner in business and the completion of the contract no longer were important to the national defense and denied the application (Exs. at pp. 29-39, 136-144). Under the Regulations, that application went no further and, therefore, did not reach the Army Contract Adjustment Board—not until counsel intervened years later, by which time the petitioner was out of business and the Army Contract Adjustment Board held that that fact precluded relief, whether or not it had been unjustly denied previously (Exs. at pp. 40-45, 152-153, 213-218).

The Complaint to the Court of Claims and Proceedings Thereon

Petitioner, invoking and relying upon above quoted 28 U.S.C. 1491 and the Administrative Procedure Act, brought suit in the Court of Claims, setting forth two causes of action (1-23): the first for a reformation of the "as of 30 August 1951" contract amendment purporting to implement the August 10, 1951 decision and award of the Army Contract Adjustment Board to con-

form it to that award so as to provide for a unit increase to $4,689.31 as of February 20, 1951 "F. O. B. Plant" or, taking into account the subsequently conceived and ordered changes, $4,728.31; the second cause of action for the subsequent cost price increases amounting to $31,349.04 as reported in the Army Audit Agency's report dated October 10, 1952 (190-212), less $5,545.41 thereof paid for by amendment No. 9.

The basis of the first cause of action is the failure of the Contracting Officer, through misapprehension, to comply with the decision of the Army Contract Adjustment Board of August 10, 1951 although bound and intending to do so. The basis of the second cause of action is that the denial of the additional costs "was arbitrary, capricious and contrary to the letter and spirit" of the First War Powers Act and "the policy thereof and thereunder" (complaint pars, 28-31 at p. 8).

The two causes of action are successive, not duplicatory. Hence judgment was asked for the aggregate of the amounts involved in each (11).

After answer (53-56), the Government moved for summary judgment of dismissal (57-164 plus unprinted Ex. 16). Plaintiff cross-moved for summary judgment granting the relief prayed for in the complaint (165-220).

Both motions were based on the documents in the case. The petitioner submitted also an affidavit (165-175) in which it complained that the intra-government proceedings following petitioner's application for the rectification of the error in the implementation of the Army Contract Adjustment Board's decision of August 10, 1951 was violative of due process, and supported that statement by reference to the documents (see 167-173). The substance of that complaint is that in 1952 the Board acted without notice to petitioner and that in 1955 it made its decision in advance of the hearing which it accorded petitioner. Those facts appear conclusively in the govern-

ment's documents which appear as exhibits in this case. Petitioner's affidavit also set forth facts in contradiction of assertions in the Contracting Officer's denial of the second application (173-175).

Petitioner, in its brief to the Court of Claims, took the position that if any of the statements of fact contained in its affidavit were controverted and if such fact be deemed material to the disposition of the case, a trial should be had in respect to such controverted assertions of fact (225-226).

The Decision and Opinion of the Court of Claims

In denying petitioner's motion and in granting the Government's motion for summary judgment dismissing the complaint, the Court of Claims predicated that disposition upon the following rulings of law (300) which give rise to this application:

> "Except for the First War Powers Act, *supra,* plaintiff would of course have no basis whatever for asking an increase in the contract price, and the First War Powers Act was not passed for the benefit of contractors or for their relief from an unprofitable contract, but solely for the benefit of the nation as a whole, in order to facilitate the prosecution of the war. *Atlantic Corporation* v. *United States,* 125 C. Cls. 464, 480.
>
> The Act committed to the sole discretion of the President the determination of whether or not an increase in the contract price would facilitate the prosecution of the war. His action, or the action of the agencies to whom he had delegated the power granted, was not subject to review by the courts. Indeed, the Act conferred no rights on the contractor. *Theobald Industries, Inc.* v. *The United States,* 126 C. Cls. 517; *Waller* v. *The United States,* 114 C. Cls. 640; *Centaur Construction Company, Inc.* v. *The United States,* 107 C. Cls. 498."

Reasons for Granting the Writ

1. The questions of federal law presented here, as outlined at pages 2-3, *supra,* never have been passed on by this court in respect to the First War Powers Act. Indeed, despite the citations in the above quotation, the decision here sought to be reviewed is without precedent anywhere, as is shown below.

2. The decision by the Court of Claims, as just quoted, not only is without precedent; it seems to be in conflict with *U. S.* v. *Laughlin,* 249 U. S. 440, 1919 (in respect to an Act of Congress providing for refunds "where it shall appear to the satisfaction of the Secretary of Interior" that an excessive payment had been made); *Dismuke* v. *U. S.,* 297 U. S. 167, 1936 (relating to the Civil Service Retirement Act)—see particularly pages 172-3; *Pope* v. *U. S.,* 323 U. S. 1, 1944 (holding that where a statute calls for equitable consideration on the part of the government, those intended to be benefited become vested with legal rights, enforceable as such); *Avcock-Lindsey Co.* v. *U. S.,* 171 F. 2d 518, 5th Cir., 1948 (holding that those who qualify, under regulations of the Secretary of Agriculture, for subsidy payments under the Federal Soil Conservation and Domestic Allotment Act, may sue therefor); *Illinois Packing Co.* v. *Snyder,* 151 F. 2d 337, 5th Cir., 1945 (holding that meat subsidies under the wartime Price Regulations were not mere gratuities which could be granted or denied within the absolute discretion of the administrative authorities); *U. S.* v. *Lennox Metal Manufacturing Co.,* 225 F. 2d 309, 318, 2d Cir., 1955 (holding that where circumstances warrant "may" is read to mean "shall" and where under a contract the government's agent's decision is conclusive, "the government owes a corresponding duty to have its agent's judgment exercised reasonably and not capriciously or in bad faith").

The use in the statute of the term "authorizes", of course, does not render its provisions purely and solely optional. "Authorize" in a grant of authority to an official,

like the word "may", confers jurisdiction. Grant of jurisdiction implies *duty* to exercise it. That is apparent from the fact that statutes conferring jurisdiction upon courts, usually are in permissive and not mandatory terminology. Yet, it hardly will be suggested that, absent clear provision for the exercise of selectivity, a court may refuse to adjudicate or may grant or refuse relief as it may will in the exercise of an absolute, as distinguished from a judicial, discretion.

In none of its own previous decisions cited by the Court of Claims as authority for its decision here was there such a sweeping abnegation of jurisdiction to review administrative determinations. Indeed, the cumulative effect of those cases seems to us to be quite to the contrary, as we think clearly appears from the following brief review.

Atlantic Corporation v. *U. S.*, 125 C. Cls. 464 (1953), did not involve Section 201 of the First War Powers Act; the discussion there of that section was *obiter;* the court did not undertake to construe that section but merely noted that the administrative authorities had given thereto a "restricted and narrow" construction which, the court implies, both surprised and displeased Congress.

In *Theobald Industries* v. *U. S.*, 126 C. Cls. 517 (1953), the court did not hold that there was no right of review; on the contrary, it exercised the jurisdiction of review and concluded that no error was shown, the court saying: ". . . we are unable to find that there was an abuse of discretion, or that the action was arbitrary, capricious or so grossly erroneous as to imply bad faith. On no other basis are we authorized to review an act of an official of the department in making a decision which involves the exercise of discretion."

In *Waller* v. *U. S.*, 114 C. Cls. 640 (1948), the Court held only that the Comptroller General could not overrule the allowance of a contract price increase to compensate for a market price rise, even though there was neither holding nor claim that the huge corporations there benefited could

not afford to absorb the loss which the performance of their contracts would entail.

In *Centaur Construction Co. Inc.* v. *U. S.*, 107 C. Cls. 498 (1947), the court held merely that the Act did not apply to contracts which had been completed before its enactment.

No other case was cited in the Court of Claims' decision in support of its present sweeping holding that, in no circumstances, can section 201 of the First War Powers Act give rise to a cause of action in favor of a contractor.

3. Moreover, even if it were true that Section 201 of the War Powers Act *per se* creates no legal rights, the fact of the matter is that the President in exercising his authority thereunder has enjoined upon his delegates a regulated procedure with determination in accordance with the exercise of sound judgment. Under this court's decision in *Service* v. *Dulles*, 354 U. S. 363 (1957), confirming *Accardi* v. *Shaughnessy*, 347 U. S. 260 (1954), this voluntary adoption of formalized procedure, even under a statute which by its terms vests "*absolute discretion*" (not present in this case), created a legal right to judicial review and correction. The decision herein, it is submitted, violates also that principle. That is of double significance here because it is claimed that not only does the result violate the intent and provisions of the Act and Regulations thereunder, but also that such erroneous result came about and was contributed to by violations of procedural due process.

4. Furthermore, the first cause of action involves not the question of the granting of relief by the ultimate administrative authority vested with the right and duty of determination but concerns *the carrying out by a subordinate of a determination which had been made by the ultimate authority and was binding upon him.*

The grievance here is that the subordinate, although intending and striving to carry out the determination,

failed to do so solely through confusion and mistake, as was subsequently recognized and acknowledged.

The holding that there is absent jurisdiction to correct such an unintended error by a judgment reforming the amendatory contract to set forth the relief which had been directed and intended, is contrary to *Ackerlind* v. *U. S.*, 240 U. S. 531 (1916); *Iowa & Wisconsin Bridge Co.* v. *U. S.*, 114 C. Cl. 464, 504, 84 F. Supp. 852 (1949), c. d. 339 U. S. 982; *Poirer & McLane Corporation* v. *U. S.*, 130 C. Cls. 373, 120 F. Sup. 209 (1954); *Shepherd* v. *U. S.*, 125 C. Cls. 809, 113 F. Sup. 648 (1953); *Sutcliffe Storage & Warehouse Co.* v. *U. S.*, 125 C. Cls. 297, 112 F. Sup. 590 (1953); *Elastic Stop Nut Corp.* v. *U. S.*, 132 C. Cls. 631, 113 F. Supp. 446 (1953); *John A. Johnson Contracting Corp.* v. *U. S.*, 132 C. Cls. 645, 132 F. Supp. 698 (1955). While none of those cases involved the implementation of an award of relief rendered under the First War Powers Act, it seems difficult to suggest any ground for exempting awards under that Act from the general provision of Section 1009 (e) of the Administrative Act (*supra*, p. 6) that the determination of "the meaning or applicability of the terms of any agency action" presents a justiciable issue which "the reviewing court shall decide."

5. The importance of the above questions, it is submitted, is obvious. Their importance to those who contract with the government is self-evident. They are even more important, it is submitted, to the nation, despite the Army Contract Adjustment Board's failure to appreciate the crucial importance to the national defense of equitable treatment of contractors. It is manifest that the national defense is dependent upon the readiness, willingness and ability of contractors to contract, to diligently perform their contracts, to maintain facilities therefor even during periods of slackened procurement so that when it becomes necessary to increase and accelerate, as perhaps at the present moment, there will be available the facilities, the know-how, the manpower, and, not least of all, the eager

readiness to cooperate. That cannot be realized without fair and square treatment of contractors. It was precisely on that basis that in *Waller* v. *U. S., supra,* 114 C. Cls. 640, increases were awarded by the administrative authorities and upheld by the Court of Claims over their disallowance by the Comptroller General. The government protects itself by legislating that when the performance of a contract results in more than a fair profit, however that be brought about, there shall be renegotiation and refund to the government. Simple equity requires that, reciprocally, when, through no fault of a contractor and due to unforeseen circumstances, a loss is suffered, the contractor shall be made whole. The absence of such mutuality is bound to act adversely to the national defense —contractors thereby will be discouraged from bidding and when they bid they will feel obliged to make certain that their bids are high enough to provide a safe margin against the exigencies of rise in cost and other possible contingencies and thus the government will pay more whether or not those contingencies arise.

It seems apparent that Section 201 of the First War Powers Act was actuated by a realization that the national defense is dependent upon reciprocally fair and morally equitable conduct between contractors and the government. Absolute discretion in a contracting officer or other official is incompatible with such a scheme of operation. That inconsistency renders unreasonable the imputation to Congress of an intent to bestow no right to enforce relief under its Act.

Even if it be assumed, in unwarranted derogation of the people's lawmakers, that "the benefit of the nation as a whole" was Congress's *sole* concern and it cared not a whit for or about fair dealing as such, nonetheless, it seems quite apparent that the method and means Congress envisaged and invoked of benefiting the nation, in this area, were fairness, equitableness and reasonableness to contractors and, at times, even aids above and beyond

that. Those objectives are not achievable by putting the contractors in the position of being subordinately obliged always to have their hats in hand looking for grace from those in a position to be arbitrary beyond review. The necessary cooperativeness and morale can be achieved only by vesting contractors with the right to have relevant facts objectively determined and the means to enforce that to which, on such facts, they, in equity and good conscience, be entitled. To presume that Congress did not intend the concomitants necessary to achieving its aim is to impute to it the intention to legislate frustration.

Moreover, necessity of fair and just and judicial—not arbitrary—administration of the Act was fully recognized by the President. Either in interpretation of Congress' intent or from an independent view that the authority vested in him should be exercised on the basis of even-handed justice and judicious procedure and determination, the President provided therefor by his Regulations. The word "discretion" appears nowhere in the Rules or Regulations. Nor does any synonym thereof. On the contrary, they call for the exercise of "sound judgment" in every instance and at every stage.

6. In summary, it is submitted that the decision below is grievously erroneous and it is so damaging to both public good and private right that the question should be fully considered by this court and authoritatively decided.

CONCLUSION

Accordingly, it is respectfully submitted, the applied for writ should issue.

Respectfully submitted,

BOLINDERS COMPANY, INC.,
by

COPAL MINTZ,
Attorney for Petitioner.

December 23, 1957.

APPENDIX

Opinion and Judgment of Court of Claims (Record pp. 297-301; 153 F. Supp. 381).

IN THE

UNITED STATES COURT OF CLAIMS

No. 65-56

(Decided July 12, 1957)

BOLINDERS COMPANY, INC. v. THE UNITED STATES

Mr. Copal Mintz for plaintiff.

Mr. Alfred J. Kovell, with whom was *Mr. Assistant Attorney General George Cochran Doub,* for defendant.

ON PLAINTIFF'S AND DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT

WHITAKER, Judge, delivered the opinion of the court:

Plaintiff herein claims that it failed to receive the full amount to which it was entitled under an amendment to a contract for the supply of 228 diesel power units to the United States Army. It also claims that defendant arbitrarily denied a second application for a price increase under the same contract.

Plaintiff represented to the Secretary of the Army that it was losing money on its contract, and that it would have to default, unless the contract price was increased. Under the authority of section 201 of Title II of the First War Powers Act, as amended, 55 Stat. 838, 839, 64 Stat. 1257,

the President authorized the Department of the Army to enter into, modify, or amend contracts whenever such action would "facilitate the national defense." Acting pursuant to the authority of this Act, plaintiff's application was granted, and the contract price was increased by the Army Contract Adjustment Board, acting for the Secretary, "in the amount of $169,246.68 only." In the next paragraph of its determination, however, the Board added:

> b. To enable the contractor to obtain such increase, the contracting officer is authorized to execute a supplement to the contract increasing the unit price thereof from $3,947 to $4,689.31 per unit, applicable to the entire contract quantity; namely, 228 units. * * *

It is this last paragraph that is the basis of plaintiff's claim. The contracting officer did increase the total contract price by the amount of $169,246.68, but he did not increase the unit price of each item from $3,947 to $4,689.31. The reason for this is the following:

The original contract called for the delivery of 214 diesel power units, described as Power Unit P. E. 215, at a unit price of $3,947 f. o. b. destination, amounting to a total of $844,658. Additional items to be supplied increased the total contract price to $847,844.27, after deduction of one-tenth of one per cent for time discount. Several amendments to the contract were made during the year 1951. The total number of units was increased to 228, and the unit price was reduced, because of the elimination of certain items in the specifications, to $3,919.30. Later, inspection and shipping instructions were changed to call for inspection and delivery f. o. b. plant, Newark, New Jersey, rather than at destination. This resulted in a further decrease in the unit price for the 10 engines already delivered to $3,820.70, and for the 218 to be delivered, to $3,842.20. Still later the specifications were

amended to call for additional things at an increased cost of $17.50 per unit.

As a result of all these changes, the unit price of 10 of the diesel engines was decreased from $3,947 to $3,838.20, and the unit price of 218 of them was decreased from $3,947 to $3,859.70.

All of these changes in the unit price were agreed to by plaintiff. They were all made before the decision of the Contract Adjustment Board, but after the recommendation for an increase by the contracting officer.

The contracting officer's recommendation for an increase was from the original contract price of $3,947 to $4,689.31, or a total of $169,246.68. The Contract Adjustment Board concurred in the contracting officer's recommendation for a total increase of $169,246.68. It also concurred in his recommendation for an increase in the unit price from $3,947 to $4,689.31, but this was in error, because the Board overlooked the fact that after the contracting officer's recommendation the unit price had been decreased by agreement from $3,947 to $3,859.70 for 218 of the units, and to $3,838.20 for 10 of them.

Had the price been increased from $3,859.70 to $4,689.31 and from $3,838.20 to $4,689.31, the total increase would have considerably exceeded the limit of the increase specified by the Contract Adjustment Board, which was, in the words of the Board, "$169,246.68 *only.*" [Italics ours.]

After the decision of the Contract Adjustment Board, the contracting officer amended the contract so as to give plaintiff the total increase authorized by the Board, but he did not increase the unit price to the top amount authorized by the Board because, as stated, this would have made the total increase much larger than that authorized.

The plaintiff claimed that this gave it less relief than the Board had intended to grant, and asked that the matter be

resubmitted to the Board. This was done. In reply the Board instructed the contracting officer in part as follows:

> 3. While the increase authorized by the Board in its decision of 10 August 1951 may not be sufficient to cover all the items of cost entering into the contractor's increased cost of performance, the record discloses that the amount authorized was the exact amount recommended by the Signal Corps contracting officer, which amount the Board believed would enable the contractor to complete the contract without impairment of its productive ability. The issue at the present time, therefore, is not whether the amount authorized by the Board was sufficient to make the contractor whole, but whether an additional amount is required to prevent impairment of the contractor's productive ability.
>
> 4. The record is therefore returned to you herewith in order that the data normally required in support of an application for a contract price increase without consideration may be obtained and the matter resubmitted to the Board in accordance with its entitled subject; namely, as an "Application for Supplemental Relief."

The plaintiff made a second application for an increase in price on May 5, 1952. The contracting officer recommended denial. The Chief of Engineers found that plaintiff's continued operation as a source of supply was not essential to the national defense, and that the granting of relief would not facilitate the national defense, and he directed the contracting officer to deny plaintiff's application.

The matter was again brought to the attention of the Contract Adjustment Board. That Board found that even though the relief requested be granted, that the plaintiff

would probably be forced into receivership or bankruptcy anyway, and concluded that the request for relief—

> "* * * be denied for the specific reasons that the Contracting Officer is not firmly and clearly convinced that (such) action is necessarily and urgently required to facilitate the National Defense,' nor can he find that denial 'will impair the productive ability of a Contractor whose continued operation as a source of supply is found to be essential to the National Defense * * *.'"

Thereafter, upon request for further consideration, the application for relief was again denied.

Except for the First War Powers Act, *supra*, plaintiff would of course have no basis whatever for asking an increase in the contract price, and the First War Powers Act was not passed for the benefit of contractors or for their relief from an unprofitable contract, but solely for the benefit of the nation as a whole, in order to facilitate the prosecution of the war. *Atlantic Corporation* v. *United States*, 125 C. Cls. 464, 480.

The Act committed to the sole discretion of the President the determination of whether or not an increase in the contract price would facilitate the prosecution of the war. His action, or the action of the agencies to whom he had delegated the power granted, was not subject to review by the courts. Indeed, the Act conferred no rights on the contractor. *Theobald Industries, Inc.* v. *The United States*, 126 C. Cls. 517; *Waller* v. *The United States*, 114 C. Cls. 640; *Centaur Construction Company, Inc.* v. *The United States*, 107 C. Cls. 498.

Plaintiff's claim, therefore, that the Army Audit Agency Report shows that the increase granted did not take into consideration certain items of increased costs is beside the point. The increase was not granted in order to make the

contractor whole, but, in the words of the Board, "to prevent impairment of the contractor's productive ability." It was granted "to facilitate the national defense."

It results that plaintiff's motion for summary judgment must be and it is denied. Defendant's motion for summary judgment is granted, and plaintiff's petition is dismissed.

It is so ordered.

LARAMORE, *Judge;* MADDEN, *Judge;* LITTLETON, *Judge;* and JONES, *Chief Judge,* concur.

Order of Court of Claims Denying Motion for Rehearing (Record 321):

These cases come before the court on motions for rehearings, amendment of judgments or new trials under Rules 53 or 54 of the Rules of this court and, on consideration thereof,

IT IS ORDERED this ninth day of October, 1957, that said motions be and the same are overruled as follows:

* * * * *

65-56 Bolinders Company, Inc. Plaintiff's motion.

By the Court

/s/ MARVIN JONES
Marvin Jones,
Chief Judge.

Executive Order and Regulations

Executive Order No. 10210, February 2, 1951, 16 F. R. 1049, 3 C. F. R. (1951 Supp.)

By virtue of the authority vested in me by the First War Powers Act, 1941, as amended by the act of January 12, 1951, entitled "An Act To Amend and extend title II of the First War Powers Act, 1941" (Public Law 921, 81st Congress), hereinafter called the Act, and as President of the United States and Commander in Chief of the armed forces of the United States, and deeming that such action will facilitate the national defense, it is hereby ordered as follows:

PART I

Under such regulations, which shall be uniform to the extent practicable, as may be prescribed or approved by the Secretary of Defense:

1. The Department of Defense is authorized, within the limits of the amounts appropriated and the contract authorization provided therefor, to enter into contracts and into amendments or modifications of contracts heretofore or hereafter made, and to make advance, progress, and other payments thereon, without regard to the provisions of law relating to the making, performance, amendment, or modification of contracts.

2. The Secretaries of Defense, the Army, the Navy, and the Air Force may exercise the authority herein conferred and, in their discretion and by their direction may delegate such authority to any other military or civilian officers or officials of their respective departments, and may confer upon any such military or civilian officers or officials the power to make further delegations of such authority within their respective departments.

* * * * *

4. The Department of Defense may by agreement modify or amend or settle claims under contracts heretofore or hereafter made, may make advance, progress, and other payments upon such contracts of any per centum of the contract price, and may enter into agreements with contractors or obligors, modifying or releasing accrued obligations of any sort, including accrued liquidated damages or liability under surety or other bonds, whenever, in the judgment of the Secretaries of Defense, the Army, the Navy, or the Air Force, respectively, or their duly authorized representatives, the national defense will be thereby facilitated. Amendments and modifications of contracts may be with or without consideration and may be utilized to accomplish the same things as any original contract could have accomplished hereunder, irrespective of the time or circumstances of the making, or the form, of the contract amended or modified, or of the amending or modifying contract, and irrespective of rights which may have accrued under the contract or the amendments or modifications thereof.

* * * * *

Regulations Governing the Exercise of Certain Contractual Authority in Connection with Emergency Powers, 16 F. R. 2623, 32 C. F. R. §§ 438.1 et seq. (1951 Revised Ed.)

§ 438.1 GENERAL CONSIDERATIONS. (a) By title II of the First War Powers Act, 1941, 50 U. S. C. App., 611, as amended by Public Law 921, 81st Congress (referred to in this part as to the "act") and Executive Order No. 10210, dated February 2, 1951 (3 C. F. R., 1951 Supp., p. 72) the Secretaries of Defense, Army, Navy and Air Force have authority, under such regulations as may be

prescribed or approved by the Secretary of Defense, to enter into contracts and into amendments or modifications of contracts, heretofore or hereafter made, and to make advance, progress, and other payments thereon, without regard to the provisions of law relating to the making, performance, amendment, or modification of contracts.

(b) The regulations in this part set forth the standards governing the exercise of certain of the authority made available by said act and Executive order. The regulations in this part do not purport to cover all the authority conferred by the act and Executive order but are confined to (1) amendments of contracts without consideration, (2) correction of mistakes in contracts, * * *

(c) The authority granted by the act and the Executive order as described herein is an extraordinary one and its exercise must be carefully administered. Carelessness and laxity on the part of contractors should not be encouraged by the practice of granting relief to such contractors even though denial of relief in a particular case may result in some lack of cooperation on the part of a contractor.

§ 438.2 Standards Governing Exercise of Authority. (a) Any action taken under this section must be based on a finding that the national defense will be facilitated thereby.

(b) The determination of whether in a particular case a contract amendment to be entered into without consideration, or the correction of a mistake or ambiguity in a contract, or the formalization of an informal commitment will facilitate the national defense is a matter of sound judgment to be made on the basis of all of the facts of such case. Although it is obviously impossible to predict

or enumerate all the types of cases with respect to which relief may appropriately be granted, examples of certain cases or types of cases where relief may be proper are set forth in this paragraph. Such enumeration is not intended to exclude other cases where the circumstances are such as to warrant the granting of relief, and even in the enumerated cases other factors may result in a denial of relief.

EXAMPLES

(a) AMENDMENTS WITHOUT CONSIDERATION. (1) Where an actual or threatened loss on a defense contract, however caused, will impair the productive ability of a contractor whose continued operation as a source of supply is found to be essential to the national defense, the contract will generally be equitably adjusted to the extent necessary to avoid such impairment of the contractor's productive ability.

* * * * *

§ 438.3. CONTRACTUAL PROVISIONS AND RECORD REQUIREMENTS. (a) All contracts and amendments to contracts made under the authority of the regulations in this part shall:

(1) Make reference to the act and the Executive order;

(2) Contain a statement of the facts and circumstances which justify action;

(3) Include a finding that the national defense is facilitated thereby; * * *

* * * * *

§ 438.4 EXERCISE OF AUTHORITY. (a) The authority to approve requests for amendments of contracts without consideration, as referred to in § 438.2, will not be delegated below the level of a contract adjustment board to be

established in each department. Each such board may be delegated the power of final determination.

(b) The authority to approve requests for correction of mistakes and ambiguities in contracts and for formalization of informal commitments, as referred to in § 438.2, will not be delegated below the level of the head of a procuring activity as defined in § 400.201-4 of this chapter (paragraph 1-201.4 of the Armed Services Procurement Regulations), without specific approval of the Under or Assistant Secretary for procurement.

(c) The exercise of authority under the regulations in this part will be in accordance with detailed instructions or directives, which shall be uniform to the extent practicable, issued by each Department concerned.

* * * * *

Chapter V—Department of the Army
Subchapter G—Procurement
Army Procurement Procedure
Miscellaneous Amendments

General Provisions, 16 F. R. 7650-7654, 32 C. F. R. §§ 590.900-906-2 (1951 Rev. Ed.)

* * * * *

SUBPART I—EXERCISE OF AUTHORITY UNDER TITLE II, OF THE FIRST WAR POWERS ACT, AS AMENDED, AND EXECUTIVE ORDER NO. 10210

§ 590.901 *Statutory and Administrative Authority.* * * *

(c) "Regulations Governing the Exercise of Certain Authority Granted by Title II of the First War Powers Act, as amended, and Executive Order No. 10210, Issued Thereunder," February 21, 1951, have been issued by the Under Secretary of the Army in concert with the Procure-

ment Secretaries of the Navy and the Air Force, and approved by the Deputy Secretary of Defense. The Regulations are contained in §§ 438.1-438.5 of this title. Section 438.4 (c) of this title authorizes the issuance of this subpart.

* * * * *

§ 590.903 *Delegations of authority.*

§ 590.903-1 *To the Under Secretary of the Army.* All of the authority granted to the Secretary of the Army has been delegated to the Under Secretary of the Army.

§ 590.903-2 *To Army Contract Adjustment Board.* The following authority has been delegated to the Army Contract Adjustment Board, heretofore established in the Office of the Under Secretary of the Army:

(a) To approve all requests for amendments of contracts without consideration.

(b) To approve correction of all mistakes in contracts.

(c) To approve correction of mutual mistakes and ambiguities in contracts, and contracts formalizing informal commitments, irrespective of amount.

(d) To consider, adjust, and make final determinations of all requests for relief under this procedure and the authorities referred to in § 590.901.

(e) All authority not otherwise expressly delegated in these procedures is reserved to the Board.

* * * * *

§ 590.904 *General considerations.* (a) The authority granted in this section is an extraordinary one and its exercise must be carefully administered.

(b) Carelessness and laxity on the part of contractors should not be encouraged by the practice of granting relief

to such contractors even though denial of relief in a particular case may result in some lack of cooperation on the part of a contractor.

* * * * *

(d) At all events, no action under the above-described authority should be taken or recommended to higher authority unless the officer or official required to take such action or make such recommendation, is firmly and clearly convinced that the action is necessarily and urgently required to facilitate the national defense.

* * * * *

(e)(6) Even if the applicant appears to be entitled to relief under basic law and regulation, however, it is reiterated and emphasized that such relief cannot be granted under this authority unless a finding can be made to the effect that the granting of such relief will facilitate the national defense.

(f) Applications for relief will be reviewed and passed upon only with full consideration of the provisions of this section.

(g) All determinations and findings required by § 590.905 will be made.

(h) The determination of whether in a particular case a contract amendment to be entered into without consideration, or the correction of a mistake or ambiguity in a contract, or the formalization of an informal commitment will facilitate the national defense is a matter of sound judgment to be made on the basis of all of the facts of such case. Although it is obviously impossible to predict or enumerate all the types of cases with respect to which relief may appropriately be granted, examples of certain cases or types of cases where relief may be proper are set forth below. Such enumeration is not intended to exclude

other cases where the circumstances as such as to warrant the granting of relief, and even in the enumerated cases other factors may result in a denial of relief.

§ 590.905 *Determinations and findings.* (a) Any action taken or recommended to high [sic] authority under this subpart must be based on a written finding that the national defense will be facilitated thereby.

• • • • •

(c) As to all amendments of contracts without consideration and correction of mistakes, other than mutual mistakes as defined in § 590.908-1 (a) each contract and amendment to contracts will contain an individual affirmative finding and each report and recommendation will contain an individual affirmative or negative finding, with respect to the facilitation of the national defense.

§ 590.906 *Amendments to contracts without consideration.*

§ 590.906-1 *Conditions under which relief may be granted or recommended.* (a) Where an actual or threatened loss on a defense contract, however caused, will impair the productive ability of a contractor whose continued operation as a source of supply is found to be essential to the national defense, the contract will generally be equitably adjusted to the extent necessary to avoid such impairment of the contractor's productive ability.

• • • • •

§ 590.906-2 *Administrative procedures.* • • •

• • • • •

(b) *Action by contracting officer.* (1) The contracting officer will review the application and verify the contents thereof.

Regulations.

(2) If further information is required, request the contractor to furnish the same, in writing.

(3) If in the opinion of the contracting officer the application does not justify the granting of the relief sought after consideration of §§ 590.904 and 590.906-1, a written finding may be furnished to the contractor in substantially the form indicated in § 590.906-3 (b), providing such action is authorized by procuring activity instructions.

(4) If [sic] the opinion of the contracting officer, after consideration of the provisions of §§ 590.904 and 590.906-1, the application should be granted, and when otherwise required by procuring activity instructions, an indorsement in triplicate, inclosing three copies of the contractor's application, exhibits and contractual documents, shall be forwarded to the head of the procuring activity, • • •

• • • • • •

(c) *Action by intermediate reviewing agencies.* (1) Each echelon reviewing and passing upon such applications subsequent to the contracting officer's review and verification will review and verify the contents of the application to the fullest extent practicable: *Provided, however,* That in any case such echelons of review are authorized to rely fully upon the verification made by the contracting officer unless unusual circumstances require further verification.

(2) Make specific findings on the merits and specific recommendations with respect to whether, and the extent to which, the application should be approved or denied.

(3) Make a specific finding as to whether the national defense would be facilitated by the granting of the application.

Regulations.

(4) Heads of procuring activities are authorized to require all applications to be forwarded and initial determinations denying applications to be made in the office of the head of procuring activity or in any lower echelon, including the contracting officer.

(d) *Action by heads of procuring activities.* (1) Heads of procuring activities will take appropriate action as required by § 590.906-2 (c).

(2) Heads of procuring activities are authorized to deny applications without further reference to the Army Contract Adjustment Board. Appropriate written findings and determinations will be made and furnished to applicants by such agencies as may be designated by the head of the procuring activity for that purpose, including the contracting officer.

(3) If in the opinion of the head of the procuring activity, after consideration of the provisions of §§ 590.904 and 590.906-1 the application should be granted, an endorsement in duplicate, enclosing copies in duplicate of the contractor's application, all indorsements and findings, and attached papers, shall be forwarded direct to the Army Contract Adjustment Board, Office of the Under Secretary of the Army, Washington 25, D. C., recommending approval to the extent noted in such indorsement.

* * * * *